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Opinion following rehearing

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re MICHAEL B., JR., a Person Coming Under the Juvenile Court Law.	
SAN MATEO COUNTY HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. MICHAEL B., SR., Defendant and Appellant.	A153263 (San Mateo County Super. Ct. Nos. 17JD0098; 17JD0099)
In re MICHAEL B., SR., on Habeas Corpus.	A154798 (San Mateo County Super. Ct. No. 84498)

This consolidated matter involves two proceedings: (1) father's appeal of an order of the juvenile court terminating his parental rights to his son, which order father contends was erroneous because the court should have applied the beneficial parent-child relationship exception to termination (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(i)),[1] and (2) father's petition for writ of habeas corpus, which asserts an ineffective assistance

[1] All statutory references are to the Welfare and Institutions Code.

of counsel claim grounded in the failure of father's counsel to timely request a bonding study to provide support for father's claim that the beneficial relationship exception to termination applied. We agree father received ineffective assistance from his counsel and thus grant the petition, issue the writ, and reverse the court's order terminating father's parental rights to his son. We dismiss the appeal as moot.

BACKGROUND

The Family and the Petition

Father Michael B., Sr. (Michael Sr.) and mother S.B. married in 2007. Michael B., Jr. (Michael Jr.) was born three years later. While Michael Jr. was S.B.'s and Michael Sr.'s first child together, S.B. had three other children, all of whom had been the subject of dependency proceedings. Her daughter lived in the full custody of the girl's father, and her two older sons had been adopted by her cousin after parental rights had been terminated.[2]

The relationship between Michael Sr. and S.B. was fraught with substance abuse (primarily S.B.'s) and domestic violence, prompting concerns over Michael Jr.'s safety and, correspondingly, four referrals to the San Mateo County Human Services Agency (Agency) between December 2014 and June 2015.

On June 17, 2015, three weeks after Michael Jr.'s fifth birthday, the Agency filed a section 300 petition alleging S.B. placed Michael Jr. at a substantial risk of harm due to her chronic substance abuse, her failure to adequately supervise him, her refusal of voluntary services, and her volatile interactions with Michael Sr. The petition also alleged that S.B.'s parental rights to her two oldest children had been terminated in 2000 after she failed to reunify with them. As to Michael Sr., the petition alleged he was aware

[2] In their briefs, the parties refer to the adoptive mother of S.B.'s older sons as S.B.'s cousin and her mother as S.B.'s aunt. At the section 366.26 hearing, it was clarified that the family lives in the home of S.B.'s great aunt (and thus Michael Jr.'s great, great aunt) and that the adoptive mother is the great aunt's daughter. For consistency with the briefs and record, we refer to the adoptive mother as S.B.'s cousin and her mother as S.B.'s aunt.

S.B. had a chronic substance abuse problem, yet he failed to ensure Michael Jr. was adequately cared for and, further, his emotional volatility placed Michael Jr. at a substantial risk of harm.

Michael Jr. was not detained from his parents. At a July 7 uncontested jurisdiction/disposition hearing, the court sustained the allegations in the petition, declared Michael Jr. a dependent, and ordered family maintenance services for both parents.

Six-month Review

During the six-month review period, Michael Sr.'s participation in family maintenance services was minimal.[3] Nevertheless, at a January 7, 2016 six-month review hearing, the court continued Michael Jr. in the home with his father under family maintenance services. It ordered S.B. out of the home, however, because she was using drugs and not engaging in services.

On March 1, counsel for Michael Jr. filed a section 388 petition seeking to have Michael Jr. detained from his father. The request was prompted by a report that S.B., who had tested positive for methamphetamine and was not in treatment, had violated the court's stay-away order and had stayed in the home with Michael Sr. and Michael Jr. The Agency disagreed with this request. It acknowledged that Michael Sr. had in fact allowed S.B. into the home during the day when Michael Jr. was not there, but it nevertheless recommended that Michael Jr., who was being well cared for, remain in his father's custody. The court denied the petition.

The Agency's Section 387 Supplemental Petition

On May 25, 2016—nearly a year after the initial petition was filed—the Agency removed Michael Jr. (now six years old) from Michael Sr.'s care, having learned that the previous day, Michael Jr. had witnessed a physical altercation between his parents in the

[3] Because this appeal is brought only on behalf of Michael Sr., we omit facts concerning S.B. except where relevant to the issues before us.

family home that resulted in Michael Sr.'s arrest. Michael Jr. was placed in the home of S.B.'s aunt who also cared for his half-brothers.

The Agency filed a section 387 supplemental petition seeking a more restrictive placement, alleging that despite that S.B. was ordered out of the home on January 7, Michael Sr. had allowed her to reside in the home and had also left Michael Jr. in her care; the parents had engaged in ongoing altercations in Michael Jr.'s presence; and their pattern of violent and neglectful behavior placed him at substantial risk of physical and emotional harm.

On May 31, the court ordered Michael Jr. detained from Michael Sr. and ordered weekly visitation for both parents.

In its jurisdiction/disposition report on the supplemental petition, the Agency advised that Michael Sr., who had spent 12 days in jail on a domestic battery charge, had minimally engaged in court-ordered services and had violated the court's order by allowing S.B. to reside in the home, jeopardizing his ability to maintain Michael Jr. in his care. He also had nine positive tests for marijuana since January 7. However, he did not meet the criteria for bypass of services, so the Agency recommended reunification services for him and bypass of services for S.B.

On August 26, the Agency filed an addendum to its section 387 jurisdiction/ disposition report, informing the court that two weeks earlier S.B. had given birth to her and Michael Sr.'s second child, a baby boy who was two months premature and positive for amphetamines at the time of his birth. He was taken into protective custody and detained.

At a contested jurisdiction/disposition hearing on August 31, the court sustained the allegations in the section 387 supplemental petition and adopted the Agency's recommendation that it bypass services as to S.B. but order reunification services for Michael Sr.

Six-month Review on the Section 387 Petition

By the time of the six-month review, Michael Sr. was making progress on his case plan, having completed multiple components of it while working to complete others. He

denied having contact with S.B. during the review period, although she repeatedly violated a restraining order he had against her by attempting to contact him. He had consistently visited Michael Jr., with the Agency describing the visits as follows: "The father actively identifies child friendly places in the community for visits to occur. Michael Jr. usually looks forward to his time with [Michael Sr.]. The father is active during visits and shows affection towards Michael Jr. He plays with the child, asks the child about school and ensure[s] that Michael Jr. brushes his teeth and takes his vitamins during visits. Michael Jr. often has difficulty separating from the father when visits come to an end and becomes sad. The child often refuses to end visits and makes up different requests to try and prolong his time with [Michael Sr.]. The father sometimes expresses frustration and loses his patience with Michael Jr. when the child does this." Michael Jr. consistently expressed to the social worker a desire to be with his father, and the Agency was considering increasing the frequency and duration of their visits.

At a February 28, 2017 six-month review hearing, the court continued Michael Sr.'s reunification services. It increased his visitation to two times per week and granted the Agency discretion to move the visits to monitored/facilitated and eventually unsupervised.

12-month Review Report on the Section 387 Petition

The Agency's July 6, 2017 12-month status report informed the court that on May 2, a social worker had spoken with Michael Sr. and S.B., who reported they had reconciled and were living together at Michael Sr.'s residence. The social worker told them they were in violation of the restraining order protecting Michael Sr. and Michael Jr. from S.B. and ordering S.B. to stay away from the home.

Eight days later, Michael Sr. told the social worker he had made a mistake in allowing S.B. to return to the home, as he believed she was still using drugs. He expressed regret over this mistake and hoped it would not ruin his chance of reunifying with Michael Jr. He stated he was " 'done' " with S.B. and would be asking her to move out immediately.

Despite this, on June 13, Michael Sr. told the social worker S.B. was still living with him and he intended to request that the restraining order be terminated. He claimed he and S.B. had not had any issues since reconciling, she was clean and sober, and they got along as long as she refrained from drug use. Six days later, Michael Sr. vacillated, telling the social worker he was not going to have the restraining order terminated after all because he was concerned S.B. was using drugs. He again claimed to have " 'messed up by letting her in,' " and again claimed he was going to ask her to leave. The following day, he called the police when she tried to enter his house, and she was arrested.

As to Michael Jr., he remained in the home of his great aunt. She reported he was doing very well and was welcome in the home for as long as necessary. Her adult daughter, who adopted his two half-brothers, was willing to adopt him if it came to that. The social worker had asked Michael Jr. where he would prefer to live, and he answered, " 'with my dad.' " The social worker reminded him of the circumstances that led to his removal, and he immediately brought up memories of his parents fighting and his father choking his mother, which made him sad.

Michael Sr. continued to make significant progress on his case plan and maintain regular visitation. He expressed a desire to be reunified with Michael Jr., claiming he no longer had any contact with S.B. and only needed to get his finances in order.

The Agency concluded that termination of services was warranted, reasoning as follows: "The Agency continues to be concerned about the father's poor judg[]ment and what appears to be self-sabotaging behavior when reunification with Michael Jr. appeared to be near. Although the father now reports that he and the mother are no longer together, it does not appear that he has truly benefited from services given his willingness to resume a relationship with the mother in spite of her lengthy history of untreated substance abuse, and with whom he has had a highly conflictual, unstable and volatile relationship. In the few months that the parents had reconciled [Michael Sr.] vacillated between wanting to end the relationship and have the police come and escort the mother out of the home, to stating that he was going to remain with the mother and dissolve the Restraining Order. This level of instability is unhealthy and places an emotional risk to

Michael Jr. [Michael Sr.] has been receiving Court ordered services to ameliorate these issues since 2015. Yet, it seems that the reasons that led to Michael Jr.'s removal remain present and return of the child to the care of the father is not in the child's best interest. It is important to note that on June 19, 2017, the Court terminated reunification services to the father regarding Michael Jr.'s brother . . . due to these very concerns."

Report of Michael Jr.'s Court Appointed Special Advocate

On July 11, Michael Jr.'s court appointed special advocate (CASA), Kelly Martin, submitted a report. She described Michael Jr. as a "very social, curious and active child" who can be "extremely gregarious with friendly adults, and thrives on attention from caring adults around him." According to Martin, at the beginning of the school year—when Michael Jr. was still having visits with S.B.—his school counselor and teacher reported that he was "a bit withdrawn and emotionally fragile," but he had become more emotionally stable since the visits were terminated. In his placement, he seemed content and satisfied with his routine and home life. He spoke often about his half-brothers and was "well-cared for" and "loved dearly" by his extended family members. He was attending individual therapy, as well as family therapy with his father "to address the range of emotional, social, and cognitive challenges he is experiencing."

Addendum to the Agency's 12-month Report

On August 15, the Agency filed an addendum to its July 6 12-month report. Michael Jr.'s therapist reported that he was doing well in therapy, and she was focusing on his relationship and interactions with his father. She believed "there is definitely an attachment and connection between Michael Jr. and his father," and she had no concerns about Michael Jr.'s contact with his father.

At an August 18 12-month review hearing, following an off-the-record conference, Michael Sr. submitted the matter, and the court terminated his services, setting a section 366.26 permanency hearing for December 18 and reducing his visits to one hour per week.

Section 366.26 Report and Letters

On November 19, in anticipation of the section 366.26 hearing, Michael Sr. submitted a letter to the juvenile court addressing his relationship with Michael Jr. He outlined the many classes and programs he had completed to improve his parenting skills and reunify with Michael Jr. and said his son had asked when he would be able to come home. He described teaching Michael Jr. how to count, recite the alphabet, and ride a bike, and taking him to preschool, speech therapy, and kindergarten.

On December 8, the Agency filed a section 366.26 report recommending that the court find Michael Jr. adoptable and terminate parental rights. S.B.'s aunt, who had cared for Michael Jr. since his May 25, 2016 removal from Michael Sr.'s care, was unable to adopt him due to her age, but her adult daughter, who adopted Michael Jr.'s two half-brothers, was willing to adopt him. According to the Agency, Michael Jr. is bonded with her and was thriving under her care.

The Agency also reported that Michael Jr. had been visiting with Michael Sr. and was excited after the visits. The Agency did not intend to pursue a post-adoption visitation agreement, but the cousin was willing to maintain supervised visits as long as it was beneficial to Michael Jr.

On December 12, CASA Martin filed another report in which she recommended continued visitation. She noted that during the school year, which began soon after the August termination of Michael Sr.'s reunification, Michael Jr. had become "more withdrawn and even somber" and that "his demeanor tends more towards sadness and seriousness than it used to." His teachers had also noticed "a significant change in his behavior." He was functioning below grade level, and the school believed he should be assessed for attention deficit disorder, which could explain his learning difficulties and could also, according to CASA Martin, explain his emotional and behavioral struggles.

Michael Sr.'s Trial Brief

On December 18—the day of the section 366.26 hearing—Michael Sr. submitted a trial brief in which he urged the court to apply the beneficial parent-child relationship exception to termination of parental rights. He argued that he had maintained regular

visitation and thus satisfied the first prong of the exception. As to the second prong—that the child would benefit from continuing the relationship with the parent—Michael Sr. argued he and Michael Jr. shared a strong parent/child bond: "The child was at home with the parents for the first six years of his life. Since Michael Jr. was detained the father has had regular weekly visits with the child; Michael Jr. looks forward to his visits with his father; the father actively identifies child friendly places in the community for the visits. The father is active during the visits and shows affection towards Michael Jr. He plays with the child, asks him about school and makes sure that Michael Jr. takes his vitamins and brushes his teeth. Father has demonstrated that he fills a parental role and is more than a loving friend or relative."

Section 366.26 Permanency Hearing

On December 18, the matter came on for a contested section 366.26 permanency hearing. Social worker Aldo Quintero, who had been the social worker on the case for about one and a half years, was the first witness and testified as follows:

For the first year of his life, Michael Jr. had been in the care of both of his parents. After that, Michael Sr. was his primary caregiver until May 2016. Since then, Michael Sr. had visited his son on a weekly basis, initially for one hour and then one and a half to two hours. Mr. Quintero had supervised at least half of the visits and never observed any problems, nor had he received reports of problems from the staff who supervised the remaining visits.

The visits took place at various locations in the community, typically at places that were fun for Michael Jr., such as libraries, parks, or the mall. At the beginning of visits, Michael Sr. and Michael Jr. would hug and talk to each other, with Michael Sr. displaying affection for his son. During library visits, they would read together. Michael Sr. would also assist Michael Jr. with his hygiene during visits, bringing a toothbrush and demonstrating how to use it properly. The visits were "pretty positive," with Michael Sr. "focused on giving [Michael Jr.] attention, playing with him, seeing what he needs, giv[ing] him stuff to eat." On occasions when Michael Jr. acted up, Michael Sr. "did his best to handle that behavior" and "[u]sually handled it well."

Michael Jr. referred to Michael Sr. as "dad" or "daddy" and was "[u]sually pretty positive towards his dad." He enjoyed his father's affection and attention. Asked to describe the relationship, Mr. Quintero said, "I think at this point Michael Jr. sees his father in a positive light. He looks forward to his visits. I think Michael Sr. also looks forward to his visits with Michael Jr. It seems like a positive relationship between the two."

Michael Jr. had lived with his great aunt for the year and a half since his removal, and she had been providing his day-to-day care during that time. His cousin, who had adopted his two half-brothers, had been identified as his adoptive parent. One of the half-brothers still lived with her, so Michael Jr. would live with a half-sibling. Mr. Quintero described the family this way: "[E]veryone in the house is very loving towards Michael, very positive towards Michael and willing to adopt, willing to care for Michael long term, Michael showing affection towards them as well and seems like a very consistent presence in his life."

Michael Sr. testified next, as follows:

Michael Jr. had lived with him for the six years preceding the dependency and he was the primary caregiver during that time. He taught him the alphabet and how to count, helped him with reading, and attended school events.

At the time of the hearing, Michael Sr. was visiting with Michael Jr. one to two hours a week. At the beginning of a visit, Michael Sr. would give his son a big hug and ask how he was doing and how school was going. During visits, he imparted values on Michael Jr., like how to share and be considerate of others. He taught him to say grace, hold the door open for others, and how to tie his shoes. There were occasions during visits when Michael Jr. would act out a bit, and Michael Sr. would give him consequences if he did not behave and reward him if he did. He would also make sure Michael Jr. took his vitamins.

Mr. Quintero let him choose the location of each visit, and he always chose places that were either educational or entertaining. Places they visited included a trampoline park; a Halloween balloon park, where they would take pictures and get a pumpkin;

Chuck E. Cheese, where they would have pizza and Michael Jr. would play video games with other children; and the park, where Michael Sr. would push Michael Jr. on the swings or Michael Jr. would play with other children. They would also go to the library, where they would read together, do computer games, and learn how to use a 3D printer.

At the end of some visits, Michael Sr. had difficulty convincing Michael Jr. to get in the social worker's car because he did not want the visit to end. He made a point of always telling his son he loves him, believing it important he heard him say that every day. Michael Jr. would respond that he loves him, too.

Following this testimony, the court observed that the case presented "a unique set of facts" because Michael Jr. was seven years old and had lived with his father for six years, which "is a lot of time for a young child." The court was also concerned about the CASA's observation that Michael Jr. had become more withdrawn and somber, was speaking and smiling less than before, and was also experiencing behavioral and learning difficulties at school. The court questioned whether some of these emotional and behavioral changes could be due to his separation from his father, and further questioned whether the matter should be continued for a bonding study to assess the father-son relationship. The court also queried whether anyone had explored the possibility of ordering a guardianship rather than termination and adoption. Lengthy argument on the applicability of the beneficial relationship exception to termination then ensued.

Michael Sr.'s counsel argued there was a significant bond between his client and Michael Jr. such that parental rights should not be terminated. He reiterated that Michael Sr. was Michael Jr.'s primary caregiver for the first six years of his life and there was a bond between them. Further, according to counsel, Michael Sr. "would very much act as a parent to the child. He taught him how to read, to count, do numbers, all the things that a parent normally does. And I think he continues to do—function as a—in a parental role towards Michael during the visits. [¶] He's certainly reactive in selecting the locales for the visits. He pays attention to educational aspects of it as well as fun. So those are clearly positive things. The father expresses concern about his

son's well-being and is very interested in the supplements and vitamins to keep him clear and level headed. And the Court does have to consider the age of the child. This is a seven-year-old now, and a portion of the time that the child has spent with the parent and that's substantial. It's about six years. And it's pretty clear that there is a positive interaction between the father and the child."

Michael Sr.'s counsel also pointed out that the Agency had been prepared to return Michael Jr. to his father but this was derailed by Michael Sr. reuniting with S.B. He subsequently acknowledged this was a terrible mistake based on false hope that S.B. had dealt with her drug problem and was addressing her mental health issues. He had since filed for divorce and was abiding by the no-contact order.

S.B's counsel also advocated for application of the beneficial relationship exception, observing that Michael Jr. had spent six years with his father, there was "strong evidence" of a "strong[, . . .] beneficial relationship," and termination would be "a huge mistake" for Michael Jr. She believed a bonding study would be helpful. She did not believe Michael Jr.'s recent behavioral changes had to do with his placement but rather with the impending termination of his relationship with Michael Sr. and felt that needed to be explored before terminating the relationship.

Counsel for the Agency disputed the appropriateness of a bonding study. She argued that the permanency hearing was the time to introduce evidence regarding the father/son bond and the case should not be dragged out any longer to allow for a bonding study. The CASA's report underscored the need for permanency and stability, and county counsel believed adoption was appropriate at that time. The Agency had established that Michael Jr. was adoptable, the home was a good placement, and visitation with his father would likely continue. This shifted the burden to Michael Sr. to establish the applicability of the beneficial relationship exception, but he did not submit a bonding study or request a continuance to obtain one, having submitted his trial brief raising the issue a half hour before the hearing.

Counsel for Michael Jr. believed Michael Sr. was "well-intentioned" and loved his son but pointed out that the case had been going on for years, which had been hard on

Michael Jr. When he had been in his father's care, there were repeated instances of his father reuniting with his mother. Additionally, Michael Jr. had lived in his great aunt's home for a year and a half but the behavioral changes had been recent and thus were not likely due to the separation from his father or issues in the aunt's home. Counsel also noted that the relatives are supportive of Michael Jr.'s relationship with his father and would permit continued visitation between the two. Finally, counsel agreed that Michael Jr. needed stability, which did not exist with his father because he kept reconciling with S.B. and engaging in physical violence in front of his son.

CASA Martin reiterated that Michael Jr. had become more stable since he was placed in his great aunt's home, although she agreed it was important for him to continue having a relationship with his father, which the adoptive family was willing to do.

In one final remark, noting all the comments that Michael Jr. was in a stable home, Michael Sr.'s counsel clarified that Michael Sr. was not asking for his son to be returned to his care, only that parental rights not be terminated and that the court select either long-term foster care in the current placement or a guardianship as the permanent plan.

At the conclusion of argument, the court concurred with county counsel that the section 366.26 hearing had been set for several months and all evidence should have been submitted by then. It then turned to the elements of the beneficial relationship exception, noting that the first prong—regular visitation—had been met. The second prong, it found, had not: "I also have to find substantial evidence that terminating the parental rights would be detrimental to the child. And while, as I said, I think there is a relationship, obviously, between Michael and his dad, and it appears to be close, I can't say based on the evidence that was presented today before me, that terminating his parental rights would be detrimental to Michael. I can guess, and I can say that there are some things that I would have liked more evidence on, but today is the date for the 2-6 hearing."

Accordingly, the juvenile court terminated the parental rights of Michael Sr. and S.B. to Michael Jr. and ordered adoption as the permanent plan.[4]

Michael Sr.'s Appeal and Petition for Writ of Habeas Corpus

On December 28, 2017, Michael Sr. filed a timely notice of appeal (No. A153263), followed by an opening brief on April 16, 2018. His appeal argues that the juvenile court erred in failing to apply the beneficial parent-child relationship exception to the termination of his parental rights. The Agency filed its respondent's brief on May 23.

On July 13, Michael Sr. filed his reply brief. The following day, he filed a petition for writ of habeas corpus (No. A154798), asserting a claim of ineffective assistance of counsel based on the failure of his attorney to request a bonding study prior to the section 366.26 hearing. The petition was supported by two declarations, the first of Janet G. Sherwood, a California attorney with over 40 years of experience in child welfare law. As detailed in her declaration, Sherwood is a Child Welfare Law Specialist, certified by the National Association of Counsel and accredited by the State Bar of California's Board of Legal Specialization and the American Bar Association. For 20 years, she had a private practice in which she represented parties in dependency cases in both the juvenile and appellate courts. Additionally, she periodically sits as a pro tem judge in dependency courts in San Francisco and Alameda counties, is an author of the Juvenile Dependency Case Law Updates, and authored the chapter on representing children in *California Juvenile Dependency Practice* (CEB).

Sherwood offered the following opinion: "In my experience practicing dependency law in California and with my understanding of California case law in dependency cases, if an attorney wants to prove that the parent child beneficial relationship except[ion] applies to the termination of parental rights, that attorney should obtain a bonding study or other assessment of the parent-child relationship from a

[4] Two months earlier, the juvenile court had terminated their parental rights to their infant son.

qualified expert. I teach a basic dependency course that complies with California Rule of Court 5.660. When we discuss the parental benefit exception, I always tell the class participants that if they want to raise the parental benefit exception, they must get an expert witness opinion to prove that severing the parent-child relationship will cause emotional harm to a child."

The second declaration was of Juris Dumpis, Michael Sr.'s attorney in the dependency proceeding from the day after the section 300 petition was filed through the permanency hearing. Dumpis testified as follows:

"3. On August 18, 2017, the juvenile court held a twelve-month review hearing in which the court terminated Petitioner's family reunification services with his son, Michael B. Jr., and set a Welfare and Institutions Code section 366.26 hearing for the termination of Petitioner's parental rights.

"4. I did not request or obtain a parent-child bonding study by a psychologist, therapist or any other professional to evaluate the bond between Petitioner and Michael Jr. at the twelve-month review hearing or at anytime [*sic*] prior to the Welfare and Institutions Code section 366.26 hearing.

"5. On December 18, 2017, the juvenile court held a contested Welfare and Institutions Code section 366.26 hearing to determine Michael Jr.'s permanent plan. Earlier that day, I filed a brief arguing that the beneficial parent-child relationship exception applied, and thus, the court should not terminate Petitioner's parental rights. I described the bond between Petitioner and Michael Jr., including the fact that Michael Jr. lived with Petitioner for six years, had regular weekly visits with Petitioner, Petitioner filled a parental role, and Michael Jr. and Petitioner showed affection for each other.

"6. I did not consider requesting or obtaining a parent-child bonding study to support this argument prior to the section 366.26 hearing. It did not cross my mind to obtain a bonding study because I believed that Petitioner had a strong argument that the beneficial parent-child relationship exception applied, and courts have found that the exception applies without a bonding study.

"7. Given my knowledge of this case in representing Petitioner over the course of two and a half years, I believe that a bonding study would have confirmed that Petitioner and Michael Jr. had a strong bond and that severing that bond would be detrimental to Michael Jr."

On November 21, 2018, we issued an order directing the Agency to show cause why Michael Sr.'s petition should not be granted.

On December 20, the Agency filed opposition to Michael Sr.'s petition, and on January 29, 2019, Michael Sr. filed a traverse.

On February 5, we ordered the appeal and petition for writ of habeas corpus consolidated for purposes of oral argument, if any, and decision.

DISCUSSION

Ineffective Assistance of Counsel in a Dependency Proceeding

A parent in a juvenile dependency proceeding has a right to effective assistance of counsel when a hearing may result in the loss of the care, custody, or companionship of his or her child. (§§ 316, 317.5; Cal. Rules of Court, rule 5.660(d); *In re O.S.* (2002) 102 Cal.App.4th 1402, 1407; *In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1642 (*Kristin H.*); *In re Emilye A.* (1992) 9 Cal.App.4th 1695, 1705–1708.) The parent has a right to seek review of claims of incompetence, which review may be sought via a petition for writ of habeas corpus. (*In re Carrie M.* (2001) 90 Cal.App.4th 530, 534–535; *In re Paul W.* (2007) 151 Cal.App.4th 37, 53.)

In order to prevail on an ineffective assistance of counsel claim, the parent must make a two-part showing: (1) counsel's performance fell below the objective standard of prevailing professional norms, and (2) the parent was prejudiced by counsel's failings. (*Strickland v. Washington* (1984) 466 U.S. 668, 688–695; *In re N.M.* (2008) 161 Cal.App.4th 253, 270; *Kristin H., supra,* 46 Cal.App.4th at pp. 1667–1668; *In re Emilye A., supra,* 9 Cal.App.4th at p. 1711.) Prejudice is evaluated under the harmless error standard: "[T]he parent must demonstrate that it is 'reasonably probable that a result more favorable to the appealing party would have been reached in the absence of

the error.' " (*Kristin H., supra,* 46 Cal.App.4th at p. 1668, quoting *People v. Watson* (1956) 46 Cal.2d 818, 836.)

The Law Governing the Beneficial Parent-child Relationship Exception to Termination of Parental Rights

At the section 366.26 permanency hearing, the juvenile court's task is to select and implement a permanent plan for the dependent child. When there is no probability of reunification with a parent, adoption is the preferred permanent plan. (§ 366.26, subd. (b)(1)); *In re Marina S.* (2005) 132 Cal.App.4th 158, 164.) If the juvenile court finds by clear and convincing evidence that a child is adoptable, it must terminate parental rights and order the child placed for adoption, unless it finds termination would be detrimental to the child under one or more of the statutorily specified exceptions. (§ 366.26, subd. (c)(1)(B); *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1416.) One such exception is the beneficial parent-child relationship exception, which provides that the juvenile court cannot terminate parental rights where it "finds a compelling reason for determining that termination would be detrimental to the child" because the "parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) This has been described as a two-prong analysis: "The first prong inquires whether there has been regular visitation and contact between the parent and child. [Citation.] The second asks whether there is a sufficiently strong bond between the parent and child that the child would suffer detriment from its termination. [Citation.]" (*In re Grace P.* (2017) 8 Cal.App.5th 605, 612.)

The "benefit" necessary to trigger the beneficial relationship exception is not statutorily defined. It has been judicially construed, however, to mean that "the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a

new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) Factors to be considered when determining whether a relationship is sufficiently strong and beneficial to outweigh the benefit of adoption include: "(1) the age of the child, (2) the portion of the child's life spent in the parent's custody, (3) the positive or negative effect of interaction between the parent and the child, and (4) the child's particular needs." (*In re Angel B.* (2002) 97 Cal.App.4th 454, 467, fn. omitted; accord, *In re Jason J.* (2009) 175 Cal.App.4th 922, 937–938; *In re Autumn H., supra,* 27 Cal.App.4th at pp. 575–576.)

The parent seeking to prevent termination of his or her parental rights by asserting the beneficial relationship exception bears the burden of proving the applicability of the exception by a preponderance of the evidence. (*In re J.C.* (2014) 226 Cal.App.4th 503, 529; *In re Valerie A.* (2007) 152 Cal.App.4th 987, 998.)

Michael Sr. Received Ineffective Assistance of Counsel

We first address the timeliness of Michael Sr.'s writ petition. A petition for writ of habeas corpus raising a claim of ineffective assistance of counsel in a dependency matter must be filed within a reasonable time. (*Kristin H., supra,* 46 Cal.App.4th at p. 1659.) The Agency contends that Michael Sr. did not file his petition within a reasonable time, "given the urgency of [Michael Jr.'s] need for stability and permanency." The only case the Agency cites in support of its position is *Kristin H.,* but neither that case nor any other authority persuades us Michael Sr.'s petition was untimely.

In *Kristin H., supra,* 46 Cal.App.4th 1635, mother appealed the court's disposition orders. Two months after the record was filed in her appeal, she filed her opening brief. Three months after that, she filed a petition for writ of habeas corpus asserting an ineffective assistance of counsel claim. The Court of Appeal rejected an argument by the social services agency that the petition was untimely because it was filed seven months after the disputed orders, finding that the circumstances did not warrant dismissing her

petition as untimely. (*Id.* at pp. 1658–1659.) We reach the same conclusion. Michael Sr. filed his petition the day after he filed his reply brief in his appeal, which was, as in *Kristin H.*, three months after he filed his opening brief. Even though the Agency here had already filed its respondent's brief, which was not the case in *Kristin H.*, we do not believe the timing of his petition was unreasonable. We thus turn to the merits of the petition.

As noted, at the section 366.26 hearing, Michael Sr. bore the burden of establishing by a preponderance of the evidence the two prongs of the beneficial parent-child relationship exception to termination of his parental rights. There was no dispute that the first prong—regular visitation—was satisfied. Without question, Michael Sr. maintained a solid visitation record over the course of the dependency proceeding, having regularly visited with Michael Jr. from his removal in May 2016 until the section 366.26 hearing in December 2017. The juvenile court thus focused on the second element—whether Michael Jr. would benefit from continuing that relationship. (§ 366.26, subd. (c)(1)(B)(i).) It is evident from the record that this was a case in which the beneficial relationship exception might preclude termination of parental rights. Indeed, the court recognized this to be the case, labeling the situation "a unique set of facts" because Michael Jr. was seven years old and had lived with his father for six years, which "is a lot of time for a young child." It grappled with the potential application of the exception and queried whether a continuance for purposes of obtaining a bonding study would be appropriate. While a bonding study is not required by statute or case law (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1339), given the circumstances here, a bonding study would have been useful to the court. According to expert Sherwood, parent's counsel "should obtain a bonding study or other assessment of the parent-child relationship from a qualified expert" any time counsel wants to establish the beneficial relationship exception to termination. That seems particularly true in a case such as this where, in the words of attorney Dumpis, there was a "strong argument" the exception applied.

Additionally, Dumpis offered no tactical reason for not requesting a bonding study prior to the permanency hearing, despite that he knew prior to the hearing that he intended to argue for the application of the exception. (See *In re Kristin H., supra,* 46 Cal.App.4th at p. 1671 [record revealed no practical or tactical reason for counsel's failure to bring evidence to court's attention].) Rather, he testified that "[i]t did not cross [his] mind to obtain a bonding study because [he] believed that [Michael Sr.] had a strong argument that the beneficial parent-child relationship exception applied, and courts have found that the exception applies without a bonding study." This does not evidence a strategic or practical reason for not requesting the study.

In light of the foregoing, we conclude that a reasonably competent attorney would have requested a bonding study before the section 366.26 hearing to assess the impact of severing the strong bond between Michael Jr. and his father would have on him.

The Agency disagrees, contending "it was reasonable for [Michael Sr.'s] trial counsel not to obtain a bonding study. There was no disagreement that the child and the father have an attachment. However, despite their acknowledgment of the attachment, Michael[Jr.]'s CASA representative, social workers and trial counsel all recommended that Michael remain in his placement with relatives and that he be adopted by them." Michael Sr. was not challenging the placement, nor was he seeking Michael Jr.'s return to his care. He was seeking to prevent the severance of his parental rights so that he could maintain his relationship with Michael Jr. A bonding study would have informed the court whether doing so would outweigh Michael Jr.'s need for stability and permanence through adoption.

The Agency also contends that Dumpis's declaration "does not by necessity lead to [the] conclusion" that Dumpis had no strategic reason not to obtain a bonding study. It reasons: "Mr. Dumpis now declares that he did not consider obtaining a bonding study because he thought that he already had a strong case for application of the exception and 'courts have found that the exception applies without a bonding study'. [Citation.] This statement indicates a judgment call as to whether or not more evidence (whether a bonding study or any other evidence) was required. This is true despite the speculation in

his after the fact declaration that he now believes that a bonding study would have demonstrated detriment." Dumpis's declaration does not suggest he made a "judgment call." In fact, it confirms the opposite—that he did not obtain a bonding study because it "did not cross [his] mind . . . ." And, in any event, a poor judgment call does not equate with a tactical reason that rescues counsel from a finding that counsel's conduct fell below the objective standard of prevailing professional norms.

Lastly, the Agency contends that "[i]t was not the lack of a bonding study that ultimately led to termination of the father's parental rights; rather, it was the father's own conduct and his inability or unwillingness to put the child's needs first, despite his apparent affection for the child, which led to this result." It then goes on to "recap . . . the evidence regarding the father's actions while Michael [Jr.] was in his custody . . . ." While that evidence was relevant to the Agency's decision to initiate the dependency proceeding, the removal of Michael Jr. from his father's care, and ultimately the termination of Michael Sr.'s reunification services, it is irrelevant to the question of whether Michael Jr. would benefit from continuing the relationship with his father.

Turning to the second prong of the ineffective assistance of counsel test—whether Michael Sr. was prejudiced by his counsel's deficient conduct—we agree with Michael Sr. that it is reasonably probable a different result would have obtained in the absence of counsel's incompetence. (*Kristin H., supra,* 46 Cal.App.4th at pp. 1671–1672.) At the section 366.26 hearing, the court queried whether it should continue the hearing to permit the completion of a bonding study to explore the potential detriment to Michael Jr. of severing his relationship with his father. In ultimately finding that Michael Sr. had not carried his burden of proof on the second prong of the beneficial relationship exception, the court explained that the father and son "obviously" had a close relationship, but without additional evidence from an expert evaluation, it could not find that terminating Michael Sr.'s parental right would harm Michael Jr. A bonding study would have elucidated the situation for the court and, in Dumpis's opinion, would have "confirmed that Petitioner and Michael Jr. had a strong bond and that severing that bond would be

detrimental to Michael Jr." Against the record before us, this opinion is likely well grounded.

The Agency objects that Michael Sr. has not "explain[ed] how cumulative documentation of the affectionate relationship between the father and the child could overcome" evidence "overwhelmingly showing that adoption was in Michael [Jr.'s] best interests, despite his attachment to his father." This argument is unavailing for two reasons. First, the issue is not whether a bonding study would have documented an affectionate relationship between the father and son. There was already undisputed evidence of that. The issue was whether the bond was so significant that severing the bond would be detrimental to Michael, Jr., a question on which a bonding study could have shed light. Second, the Agency details at length how beneficial his placement was and submits that this established that adoption was in his best interest. There was no question that Michael Jr.'s placement was positive, and no one was seeking to change that placement. The whole point of the beneficial relationship exception, however, is that, regardless of the child's placement, the child has such a strong parental bond that maintaining that bond overcomes the preference for adoption. (*In re Autumn H., supra,* 27 Cal.App.4th at p. 575.) Under the circumstances of this case, without a bonding study, it could not be said whether severing the bond between Michael Sr. and Michael Jr. would deprive Michael Jr. of such an emotional attachment to his father that he would be greatly harmed, in which case a guardianship would have been a more suitable permanent plan than adoption.

DISPOSITION

Michael Sr.'s petition for a writ of habeas corpus is granted. The juvenile court is directed to vacate the order terminating Michael Sr.'s parental rights to Michael Jr. and hold a new permanency hearing at which Michael Sr. is entitled to appear with competent counsel and is to be allowed an opportunity to present a bonding study or other similar assessment.

This court finds that Juris Dumpis, State Bar No. 111453, provided incompetent representation to Michael Sr. in San Mateo County Superior Court case No. 84498,

resulting in the reversal of the order terminating his parental rights in that proceeding. Therefore, pursuant to Business and Professions Code section 6086.7, subdivision (a)(2), the clerk of this court is ordered to forward a copy of this opinion to the State Bar upon issuance of the remittitur. At the same time, also pursuant to Business and Professions Code section 6086.7, subdivision (b), the clerk of this court shall also notify Mr. Dumpis that the matter has been referred to the State Bar.

The appeal is dismissed as moot.

_____
Richman, J.

We concur:

_____
Kline, P.J.

_____
Miller, J.

A153263, A154798; *In re Michael B., Jr.*